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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 441

ROBERT I. TOUSSIE,

Petitioner,

against

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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We respectfully ask the Court's indulgence briefly to reply to the Government's brief.

I.

(Replying to Government's Brief Point I, pp. 10-21.)

The Government asserts that whether an offense is a continuing one is a matter of statutory interpretation. But with respect to the statute of limitations it cites no case in this Court that is favorable precedential support for its assertion.

It cites only two cases to the contention. *U. S.* v. *Cores*, 356 U. S. 405 (1958), involves not a statute of limitations but a question of venue. The majority there relied

on the particular language of the statute relating to an alien seaman who "remains in the United States." The majority wrote: "The crucial word 'remains' permits no connotation other than continuing presence" (356 U. S. at p. 408). *Pendergast* v. *U. S.*, 317 U. S. 412, cited in our main brief, pp. 13, 15, is in our favor, for there the Court refused to extend the crime to make it a "continuous offense."

The Government seeks to assimilate the continuous process in the Selective Service System involving registrants to the problem of the non-registrant. When one registers for the draft his status becomes that of a registrant. This naturally involves a continuing status so that processing may continue. The analogy of continuing duties under the continuing status of the registrant (Govt. Br. p. 12) is inapplicable to the man who wilfully failed to register. He chose to be liable for criminal sanctions and the issue is simply when his wilful breach of his obligation to register occurred so as *immediately* to subject him to the criminal sanction.

The Government with commendable candor, admits that "of course the statute might be more explicit * * *" (Govt. Br. p. 15). The reference is to 50 U.S.C. App. § 453. But it fails to comment at all on the long standing liberal rules of construction with respect to statutes of repose in this Court (*U. S.* v. *Irvine*, 98 U. S. 450 [1878]; *U. S.* v. *McElvain*, 272 U. S. 623, 639 [1926]; *U. S.* v. *Scharton*, 285 U. S. 518 [1932]; *Bridges* v. *U. S.*, 346 U. S. 209, 215-216 [1953]; *U. S.* v. *Habig*, 390 U. S. 222, 227 [1968]; *Pendergast* v. *U. S.*, *supra;* and see discussion in our main brief, pp. 13-16).

It can hardly matter whether the attempt to enlarge the statute of limitations is by judicial interpretation or by the suggestion of "subsidiary conspiracies" (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]; *Krulewitch* v. *U. S.*, 336

U. S. 440 [1949]); or as the Court of Appeals in its opinion below conceded, by "the continuous offense doctrine" which "for all practical purposes extends the statute beyond its stated term" (A. 302).

There is something inherently unpalatable to the judicial process in the filling in of statutory gaps in criminal cases—particularly with respect to an unbroken historical tradition of liberal interpretation of statutes of repose. It is this sense of fairness of lawyers and judges that probably impelled the knowledgeable draftsmen for the American Law Institute to react so strongly to the inconsistency between the continuous offense doctrine and the purpose of time limitations (Main Br. p. 15). The example given of "too free" application of the continuous offense doctrine is significantly the judicial interpretation by the Fifth Circuit of the earlier Selective Service Act (*Fogel* v. *U. S.*, 162 F. 2d 54 [1947]). We say the criticism is significant because the Government relies so heavily on the argument that the continuous offense doctrine is essential to the Selective Service System and is "inherently" implied in the statute. If these comments were as valid and self-evident as the Government believes, we wonder why a group of objective and learned men should have singled out this particular interpretation of a Selective Service regulation rather than something else for an example of the undesirable in interpretation.*

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* Judge Sibley dissenting in the *Fogel* case, *supra*, reasoned that even if there was a continuing duty to register that did not extend the statute of limitations since the crime was complete on the day the defendant failed to register, for "nothing at all happens after the crime becomes complete" (162 F. 2d at 64). He noted that in *U. S.* v. *Irvine*, 98 U. S. 450, the duty to pay over the money was certainly a "continuing duty" but the Court held the statute of limitations applied, and began to run so soon as it was evident that the withholding was wrongful" (*Ibid.*). We respectfully suggest that Judge Sibley's view is more consonant with the historic treatment of statutes of limitation in this Court than are the views of the Courts of Appeal.

The answer is that the statutory section requiring registration contains not the slightest language supporting the continuous offense theory. The Second Circuit in its opinion below, with scrupulous intellectual honesty, refused to imply into the *statute* what was not there. Its language is not the language of a Court that has accepted the Government's present arguments.

The Court below clearly based its ruling on the regulation itself. We note that the Government has cited no instance where Congress has delegated a question of criminal time-limitation to the executive branch.

The Government appears to disagree with the Court of Appeals in urging that "it is the Selective Service statute itself which makes registration a continuing duty". We submit that the rationale of the decision below was otherwise. We do not beg the question, moreover, when we urge that "law" in the general statute of limitations does not mean a regulation (Govt. Br. p. 14). The determination of that issue is essential to the result. And for the reasons given in our main brief, we respectfully suggest that the Court of Appeals was in error on this point.

The Government contends that §§ 453 and 454 are interrelated provisions and must fairly be read in *pari materia* (Govt. Br. p. 13). The Government, we think, is wrong historically. The provision in § 454 "that notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall immediately be inducted" did not become law until June 30, 1967 by specific amendment (81 Stat. 100). § 453 on the other hand dates back to the original statute. To be read in *pari materia* the two sections must be contemporaneous enactments or at least there must be a finding that there was not a specific purpose for one section, inapplicable to the other (*U. S.* v. *Price,* 361 U. S. 304, 313 [1959]). The specific purpose of the amendment is, however, actually set forth in the legislative history of the Military

Selective Service Act, U. S. Code Congressional Administrative News (90th Cong. 1st Sess. 1967) p. 1346. The purpose of the amendment was a limited one, namely, to insure "that a registrant who prolongs such litigation of his draft classification beyond the age of 26 would nonetheless be liable for induction if he is later found qualified for induction" (See Conference Report No. 346, *id.* at p. 1353).

The amendment of 1967 had nothing to do with the doctrine of continuous offenses so far as the statute of limitations is concerned. It addressed itself to a limited problem, that is of the registrant who by litigation had extended the time for his induction beyond age of 26. It merely clarified this very special situation to provide that in such case the duty to report did not cease. To the extent, however, that it does represent a continuous duty provision of a sort, it makes clear that Congress, as we suggested, knew how to state its purpose to create a continuing duty in clear language. No such language appears in § 453.

The argument is made that Congress amended and reenacted the Selective Service statutes without suggesting that it deemed the regulation at odds with the statutory purpose. That is a fair argument. But no evidence has been adduced to show that Congress actually considered that the effect of the regulation was to extend the statute of limitations. On its face the regulation says nothing about the statute of limitations and it is hard to believe that Congress, jealous of its legislative prerogative and historic role with respect to statutes of limitation, would not have legislated about the matter itself, if it had intended to affect the general statute of limitations. Nor is there evidence that Congress gave any thought to amending the general statute of limitations itself as it affected registration for selective service. A continuing duty does not necessarily make a continuous offense with respect to the statute of limitations. (*U. S.* v. *Irvine*, 98 U. S. 450 [1878]).

As to the argument of unconstitutional delegation of legislative power, acquiescence by Congress is not the test. It is the function of this Court to declare the boundaries between the legislative and executive branches of Government (*Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421 [1935]).

The Government's argument concerning "accepted legal principles regarding continuous offenses" is weak (Govt. Br. p. 16). For a person, like Toussie, who was not yet eighteen years old when the Act took effect, there was no duty to register until he attained his eighteenth birthday. When that occurred he was obligated to register. He had a five-day period within which to register. When he failed to do so, his omission was complete. Nothing happened after that. The cases involving a continuation of a series of affirmative acts are, therefore, not in point.

Thus, the quotation from *U. S.* v. *Midstate* (Govt. Br. p. 16), does not relate to the problem of offenses "continuous" in *time,* but to the act of transportation and whether venue attaches in districts through which the goods passed —a conception unrelated to our problem.

The broad claim that "any course of conduct designed or required to accomplish the final criminal objective by stages or waiting, may result in a continuous offense" (Govt. Br. p. 16) is not supported by the cases cited. *Socony* merely involved the scope of a conspiracy to determine whether a particular overt act was sufficient for venue. *Chandler* was a treason case where the statute itself made the crime a course of conduct. *Manton, Hanf* and *Korholz* did not involve the statute of limitations problem, but merely whether the indictments were duplicitous for stating a single offense when several might have been stated. That is not the issue here. *U. S.* v. *Franklin,* is in point, at least in the sense that it deals with a registration statute. But the decision was *ex cathedra* with no

explanation for the result except for the opinion that it was essential to national security to control aliens in wartime (188 F. 2d at 187). The Third Circuit judges in *Ginn* v. *U. S.*, 222 F. 2d 289 (1955), seemed to cast some doubt on whether they agreed with the holding. In any event, alien registration statutes are distinguishable because of the Government's general control over aliens admitted within our borders.

Even if *U. S.* v. *Franklin* was rightly decided within the context of the policy of the Alien Registration statute, it is hardly precedent for holding that young men who failed to register for the draft when they were eighteen can be prosecuted thirteen years later or for a lifetime—certainly without a clear expression of Congressional intent to achieve that harsh result.

The Government scoffs at the idea that the regulation that duty to submit to registration "shall continue at all times" could be construed to mean that a man of seventy could be prosecuted for failure to register at eighteen (Govt. Br. p. 20). The fact is that two Courts of Appeal have extended the statute beyond age twenty-six (*McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U.S.*, 178 F. 2d 38 [6th Cir. 1959]).

On the continuing offense theory either the statute is without end or, as the Government now and the Court below suggest, the duty ends at age twenty-six. But this leads to an anomalous result. In practical effect it creates different periods of limitation for persons of different ages. In the initial age group required to register there were young men ranging in age from eighteen to twenty-six. (See Presidential Proclamation No. 2799, App. to Main Brief, at pp. A-6 to A-7.) If a man aged twenty-five wilfully failed to register, under the theory of the Court of Appeals, the statute of limitations ran five years after he attained the age of twenty-six—or *six* years after the

initial registration. If a man aged nineteen wilfully failed to register the statute ran five years after he attained the age of twenty-six—or *twelve* years later.

It is difficult to say that Congress intended such a result without legislative deliberation and debate. Yet, whether the regulation is interpreted as without end or as limited to age twenty-six, with attendant discriminatory consequences, the matter is certainly one of legislative policy. Either version of the continuous offense theory based on a regulation and not on a statute, is unconstitutional.

II.

(Replying to Government's Brief Point II, pp. 21-29.)

We shall not repeat our arguments with respect to self-incrimination under the Fifth Amendment. They are set forth in our main brief, pages 24-33.

Here we comment on certain arguments in the Government's brief (Govt. Br., pp. 21-29):

We do not contend that the requirement of *initial* registration for Selective Service was unconstitutional for self-incrimination reasons. Nor do we contend that if a continuing duty is *not* imposed, such a constitutional problem would arise. We do contend that if there is a continuing duty to register after the stated time for registration (18th birthday) has elapsed, it is the same, in practical effect, as if there were two statutes. The continuing duty statute requires the delinquent registrant to expose himself to prosecution for his *existing* delinquency. The fact that he has not actually registered is irrelevant in the context of the *Albertson* and *Leary* doctrines.

Regardless of the distinction the Government seeks to make between an initial registration and the case at bar, the circumstance remains that without the continuing duty

Toussie would be free, for his initial failure to register is concededly outlawed by the five-year statute of limitations. If Toussie had been indicted within five years of his eighteenth birthday for failure to register *on* his eighteenth birthday (and not for a continuous offense), the Fifth Amendment question would not have arisen. It is only if he is subject to a duty to register after the eighteenth birthday period that his conviction can be sustained as to the statute of limitations. But that makes it evident that he was prosecuted for something different from his simple failure to register when he became eighteen years of age. He was prosecuted for failure to register at some time within five years of his indictment, only because he was still under a duty to register then. This puts him in the same status as any other criminal suspect upon whom registration would impose substantial hazards of self-incrimination because of *earlier* criminal activities.

The Government has asserted in support of its continuous offense theory that "his [Toussie's] objective was not served simply by his failure to register at age eighteen; it required his continued failure to register at any time thereafter until he reached age twenty-six" (Govt. Br. p. 18).

If Toussie was continuously engaged in crime by continuously avoiding registration—as the Government claims with respect to the statute of limitations—he is in the same position as those whose "chief occupation" "involves evasion of federal criminal laws"—and "truthful answers by petitioner to these questions might have disclosed that he was engaged in such proscribed activity" (*Hoffman* v. *U. S.*, 341 U. S. 487-488 [1951]).

The constitutional rule required for the suspected racketeer is at least as applicable to the draft resistor. And, although in *Hoffman* the question was of testimonial compulsion on interrogation, the impact of a compulsion

to register, divulging name and age, is the same in this setting. The suggestion that Toussie's involvement "because of his own dereliction" puts him beyond the pale of the Fifth Amendment protection misses the whole thrust of the cases from *Albertson* down. Each defendant in the series of cases was in jeopardy because of his own derelictions. From Communist party member to narcotics or gambling purveyor they were in no different status constitutionally than Toussie.

The Government's examples of the far-reaching effect of our contention are inapposite. For example, the Government's contention that under our constitutional argument "a registrant could wilfully burn his draft card and by invoking the privilege a person could fully immunize himself from the requirement that he carry a draft card" (Govt. Br. p. 27) is an attemped *reductio ad absurdum*, but it misconceives our argument. If a registrant wilfully burns his draft card, he may be prosecuted for its destruction, but conceivably the registrant can obtain another draft card without revealing that he burned the previous card. The delinquent registrant cannot register, however, without giving his date of birth and revealing his earlier failure to register. Moreover, in the draft card burning case, the draft boards, despite present practice, may not constitutionally compel the registrant to admit that he burned his draft card.

The Government's income tax analogy is inapt (Govt. Br. p. 26). If Congress had made failure to file in a given tax year a continuous offense the problem would arise as to whether a late filing would not be protected by the privilege—as in the case at bar. Since Congress did not so provide for the particular tax year the statute of limitations runs from the date when the filing was due (26 U.S.C. §§ 6531, 6573). That any future act may incidentally reveal upon investigation the earlier failure to file is not within the privilege because what is involved is a gen-

eral duty applicable to all and not merely to a select group. In the case at bar compulsory late registration applies *only* to those who are delinquent. It may be interesting to note that the Court of Appeals for the Third Circuit recognized the Fifth Amendment problem in the context of alien registration as early as 1955, although it found it unnecessary to decide the constitutional point (*U. S.* v. *Ginn*, 222 F. 2d 289, 291 [1955]).

Lastly, the Government, in undoubted good faith, believes that a delinquent registrant would not be prosecuted in any event. But the Government frankly concedes that "there is no formalized policy on the matter" (Govt. Br. p. 28). And we know that one Kaohelauli was actually convicted as an immediate and proximate result of his tardy registration (*Kaohelauli* v. *U. S.*, 389 F. 2d 495 [9th Cir. 1968]; Main Br. p. 31). One needs no more striking illustration of the actual peril of late registration.

III.

(Replying to Government's Brief Point III, pp. 29-33.)

The Government, significantly, has argued the First Amendment point of our brief without any reference to *Girouard* v. *U. S.*, 328 U. S. 61 (1946).

The Government claims, moreover, that a view of the Free Exercise Clause favorable to our position "would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to have conscientious scruples" (Govt. Br. p. 32). That is, of course, an arguable position, as any consideration of the reach of a particular constitutional provision must be. But we suggest it is neither a sound nor a compelling position. Conscientious objection to killing has always been recognized as a special ground for exemption where general civil disobedience has not. The issue here is narrower

than the Government makes it out to be. Can the process of conscription be conscientiously deemed to be so much a part of war as to merit judicial recognition for a conscientious objector to the process? This is not the same problem as a refusal to pay taxes which are levied for the general welfare and not specifically for war. To be sure, there must be a point at which the free exercise clause must bow to the needs of the state. But where is that line?

If we limit our inquiry to the draft laws and conscientious objection to the process of conscription, we are neither embracing civil disobedience, nor suggesting more than that the balance favors freedom of religious conscience where so few objectors are involved as compared with the manpower need.

We do not repeat the arguments in our main brief (pp. 33-45). Suffice it to note that the Government has not disputed our statistics as to the relatively small number of religious conscientious objectors (Main Br. p. 39). Nor has it met the point that sincerity of belief would still have to be passed upon by a skeptical jury who would be unlikely to acquit unless the sincerity of the conscientious objection was beyond doubt. The difficulty we suggest is that a true conscientious objector to registration is deprived of any forum to test the sincerity of his beliefs if the administrative procedures of the Act are held to be exclusive. There is a heavy burden on the Government to show that the Selective Service System could not function if the few principled dissenters involved were permitted to let a jury pass on their sincerity in a criminal case. Despite broad generalizations, we respectfully suggest that the Government's position is not persuasive in terms of that burden.

CONCLUSION

For all the reasons hereinabove stated in our main brief and in this reply brief, it is respectfully prayed that the judgment below be reversed and the indictment dismissed; or, in the alternative, that the judgment be reversed and the cause remanded for a new trial.

Dated: New York, New York, January 9, 1970.

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